UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRONTIER COMMUNICATIONS CORPORATION **and** **COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13**	**Case 09-CA-247015**

RESPONDENT'S REPLY BRIEF TO THE ANSWERING BRIEFS

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I. ARGUMENT IN REPLY.

A. This Case Does Not Involve *Reverification* of Forms I-9.

In their Answering Briefs, the Counsel for the General Counsel ("CGC") and the Charging Party repeatedly and misleadingly mischaracterize this case as being about the ***reverification*** of Forms I-9. (U p. 2-6, CGC p. 12-14.)[1] It is not. It is about Frontier's effort to obtain record of ***verification*** of the employment authorization of its employees in accordance with the mandates of Federal Immigration Law. As the hearing record shows, Frontier never once referred to its compliance efforts as "***reverification***." This term was used and repeated on numerous occasions by CGC witness, Lee Perry, the Union's Administrative Director, in her hearing testimony. (Tr. 54:20-22, 57:1-5, 107:1-11; *see also* Tr. 19:24-20:2 (CGC opening statement), 22:14-16 (Union opening statement).)

"***Verification***" and "***Reverification***" are discreet terms of art under Federal Immigration Law, and the Board should not conflate them. Here, Frontier sought complete Forms I-9 from Union-represented employees for whom it did not possess such a form in order to obtain ***verification*** of their authorization to work for the Company. (Tr. 183:3-10, 194:10, 199:14-20.) This is a mandatory legal requirement, the breach of which subjects the violator to significant legal consequences. 8 U.S.C. § 1324a(a)-(b), (e); 8 C.F.R. § 274a.2(b)(2), 274a.10(b). The verification process involves the completion of only Sections 1 and 2 of the Form I-9. (CGC Ex. 3.) Frontier advised its Union-represented employees to complete only those sections of the

[1] While the CGC avoids using the phrase "reverification", he nonetheless makes this same argument and instead describes this as the discretionary promulgation of new workplace rule to require new Forms I-9. (CGC p. 12.). Citations to the Union's Answering Brief are "U p. __" and to the CGC's Answering Brief are "CGC p. __".

Form I-9. (J. Ex. 3.) At the time of its verification effort, Frontier indisputably was in violation of Federal Immigration Law. 8 U.S.C. § 1324a(a)-(b); 8 C.F.R. § 274a.2(b)(2).

In contrast, ***reverification*** applies to only a very limited set of circumstances, such as when an employee's temporary employment authorization has expired: when his/her temporary employment authorization document has expired; when he/she is being rehired within three years of the date he/she completed Form I-9; or when he/she needs to update his/her biographical information. (CGC Ex. 2.)[2] The reverification process involves completion of Section 3 of the Form I-9. (CGC Ex. 2.) Frontier did not instruct its Union-represented employees to complete that section of the form. ***Reverification*** of an employee's immigration status outside of these limited circumstances is illegal. 8 U.S.C. § 1324b(a)(6).

B. When Properly Viewed as a Case About Form I-9 *Verification*, the Arguments of the CGC and Union Collapse.

Clinging to the reverification canard, the Union argues that "Frontier's 2019 reverification process was a bargainable effect of its I-9 Advantage compliance system implementation." (U p. 2.) Aside from simply being wrong in saying this was "reverification," the Union also seriously mischaracterizes what actually occurred. Here, Frontier first adopted the I-9 Advantage compliance system as a platform to verify the employment status of employees hired after March 31, 2018, and then used it as a tool to audit its historical immigration records. That audit disclosed massive non-compliance. To remedy the non-compliance and to meet the mandatory requirements of the IRCA, Frontier directed its Union-represented employees to provide complete Forms I-9 using the I-9 Advantage compliance

[2] *See also* https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires (last visited on Feb. 3, 2021).

system. Contrary to the Union's assertion, there was nothing "bargainable" about Frontier's obligation to comply with the mandates of the IRCA.

The Union's argument that while it did not dispute "Frontier's right to adopt the I-9 Advantage system, Frontier has offered no evidence . . . showing that the reverification process at issue here was a natural or inevitable consequence of its adoption" is simply wrong. (U p. 4-5.) As noted, once Frontier discovered that its records did not meet the mandates of the IRCA, the Company's compliance effort was the only "natural and inevitable consequence" of that discovery – Frontier had a legal obligation to come into compliance with the law. To suggest otherwise would indicate a fundamental lack of understanding about the IRCA. Once an employer is cognizant of a compliance issue, it must take steps to remedy that issue. 8 U.S.C. § 1324a(a)-(b), (e); 8 C.F.R. § 274a.2(b)(2), 274a.10(b).

C. Frontier's Compliance Regimen Was Not Akin to a New Workplace Rule.

The CGC argues that Frontier must have bargained with the Union over the effects of the implementation of its Form I-9 compliance regimen because that implementation was akin to the "promulgat[ion of] a new workplace rule requiring the employees to take affirmative actions or be subject to potential discipline, including termination." (CGC p. 12.) This argument badly misses the mark.

An employer's adoption of a new work rule or requirement constitutes the employer's exercise of its discretion to have its internal operations ordered in a particular way. Frontier does not dispute that in the vast majority of cases, an employer's promulgation of a new work rule carrying the potential for discipline would trigger an effects bargaining obligation. This common construct does not fit here, however.

Frontier's actions at issue in this case were neither internally-focused nor discretionary. Frontier did not promulgate, implement or adopt the IRCA or its record-keeping requirements; those apply as a mandate of external federal law. Frontier had no discretion, and exercised none, in regard to either the application of or compliance with the IRCA. Frontier was required to comply with it in the same fashion as any other employer in the United States. Similarly, an employee that does not have a complete Form I-9 on file with his/her employer cannot lawfully work, and an employer is subject to liability for permitting a non-compliant employee to work. These are not discretionary standards and they cannot legitimately be understood to have been "adopted" by Frontier through an exercise of discretion.[3]

D. Frontier's Requirement That Non-Compliant Employees Complete a Form I-9 Did Not Change Those Employees' Working Conditions.

Both the Union and the CGC argue, as they must in order to prevail, that Frontier changed its non-compliant Union-represented employees' terms and conditions of employment when it required them to complete new Forms I-9. From this, the Union and CGC posit that Frontier was obligated to bargain over the effects of that change. (U. p. 9-10; CGC p. 14-16.) These arguments misapprehend Federal Immigration Law and misconstrue the facts.

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[3] The Union and the CGC both rely heavily on *Washington Beef, Inc*., 328 NLRB 612 (1999), as did the ALJ. That case is not an effects bargaining case and it is, therefore, inapposite to the instant case. The term "effects bargaining" does not appear in the Board's or the ALJ's decision in that case. The Board did not find an effects bargaining violation and its Order in that case does not direct the employer to bargain over the effects of the decision at issue. The violation found in that case related to the employer's refusal to bargain over "the amount of time to be given bargaining unit employees in order to establish that they possess authentic work documents." Id. at 612, n.2. This was a decisional bargaining obligation that arose as a result of the employer's placing an employee, whose immigration status was in doubt, on a three-day leave of absence during which time the employee could produce valid work documents or be terminated.

The Union resorts to its now-familiar reverification refrain, asserting that "reverification involved more than just filling out a form, and the potential consequences for noncompliance were severe." (U p. 9.)[4] As explained above, Frontier did not have its employees reverify their immigration statuses. Regarding the "burden" of immigration compliance, it was neither material nor substantial. Contrary to the Union's claim, there is no record evidence that any non-compliant employee could not locate or obtain the necessary documents to comply, or even that anyone may have been troubled by the requirement. Further, the "limited time period" for compliance was actually several months and never enforced, as established by the record. Finally, the Union claims that the specter of termination for non-compliance constituted a substantial change in employees' terms and conditions. In fact, Frontier's references to termination for non-compliance was simply a statement of the IRCA's legal requirements, not a change to working conditions. Put another way, Frontier could not have continued to employ non-compliant employees indefinitely. That is not an option under the IRCA.

The CGC's position on this issue fares no better. The CGC suggests that potential termination for non-compliance with IRCA requirements was a discretionary choice made by Frontier. As noted, Frontier had no discretion on this issue. Finally, even if there is record evidence that employees received any of Frontier's communications referencing terminations (there is not), Frontier's advising employees of this legal consequence does not alter the calculus.[5]

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[4] Despite the Union's cite thereto (U p. 8), the Board should not rely on *Aramark Educational Services, Inc.*, 355 NLRB 60 (2010), a decision issued by a two-member Board. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

[5] The Union also focuses on describing Frontier's asking employees to fill out the form as Frontier implementing a "potential for discipline" for non compliance. Not only did Frontier not create any change at all, at no point did Frontier or the IRCA suggest or contemplate anything

E. The CGC and the Union Err in Claiming That Frontier Had a Duty To Provide the Information

The CGC's and the Union's arguments regarding Frontier's obligation to produce information requested by the Union are unpersuasive. First, the Union's arguments regarding the individual deficiencies identified on Forms I-9 are inapposite to the legal issues in this case. The ALJ found that the Union was entitled to this information so it could bargain over the effects of Frontier's requiring employees to submit complete Forms I–9. Frontier argued in its exceptions brief that this deficiency information was not relevant for this purpose. In response, the Union argued that it needed this information "to confirm and clarify the scope of Frontier's" decision to ask employees to complete new Form I-9s (U p. 12), and to "independently verify" whether it agreed with Frontier's audit conclusions and, if not, to try to cause an arbitrator to overturn these conclusions. (U at 13, 19). This argument discloses the Union's true object here – to challenge the Company's individual compliance decisions. This decision-bargaining claim was not at issue in this case, however, and the Union's objective is unrelated to addressing the post-decision effects of the requirement to provide a complete Form I-9. These arguments therefore do not establish that the information was pertinent to bargaining over the effects of that decision.

Second, the CGC's arguments regarding Frontier's storage of historical IRCA compliance materials also fail. The CGC cannot overcome Frontier's position that the storage location of the Forms I-9 was not relevant to the discrete bargaining issue concerning the effects of Frontier's requiring its employees to fill out new Forms I-9. The CGC's position is factually and legally deficient.

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related to discipline. The law simply states that an employer cannot allow its employees to work without verification, which is what Frontier communicated.

Relying on pure conjecture, the CGC argued that the Union needed to obtain this information because it "was concerned the information [on the Forms I-9] could be compromised, resulting in identity theft," and it wanted to bargain to "protect" its members from the "impact of identity theft." (CGC at 19.) However, there is no record evidence that Frontier lost any Forms I-9, that any identity theft had actually occurred or that any Union-represented employee had been harmed by Frontier's record-storage practices. *S. Calif. Gas Co.*, 342 NLRB 613, 614 (2004) (here the requester must demonstrate reasonable belief of relevance supported by *objective evidence* -- an unjustified subjective fear does not make something relevant). Even if there were some evidence that Frontier mishandled these materials, that fact would not render information about the location of previously completed Forms I-9 relevant to bargaining over the effects on employees' working conditions of Frontier's compliance decision. Simply put, there is a disconnect between the information sought and the so-called effects of completing a Form I-9.

In sum, Frontier's decisions that (1) certain Forms I-9 were deficient and (2) employees with deficient Forms I-9 had to complete new forms are not at issue in this litigation. Consequently, neither the Union, nor the CGC, has articulated a credible argument that the specific deficiency information or storage location is somehow related to the alleged effects bargaining obligation at issue in this case related to those decisions.

II. CONCLUSION

For the reasons stated in its Exceptions, the Brief in Support thereof and this Reply Brief, the Board should grant Frontier's exceptions, reverse the Administrative Law Judge Decision and dismiss the Complaint in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2021, I had sent a copy of the foregoing Respondents' Reply Brief to the Answering Briefs in NLRB Case No. 09-CA-247015 to:

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This same document was then e-filed on that same date with the Executive Secretary of the National Labor Relations Board in Washington, DC.

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